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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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4 CITIZENS ASSET FINANCE, INC.,

5 Plaintiff,

6 v.

17 Civ. 7115 (AJN)

7 JUSTICE AVIATION, LLC, et al.,

8 Defendants.

Conference

9 -----x
10 New York, N.Y.
11 June 19, 2018
12 4:36 p.m.

13 Before:

14 HON. ALISON J. NATHAN,

15 District Judge

16 APPEARANCES

17 VEDDER, PRICE, P.C.

18 Attorneys for Plaintiff

19 BY: WILLIAM W. THORSNESS, ESQ.

20 ZIELKE LAW FIRM

21 Attorneys for Defendants

22 BY: JOHN H. DWYER, JR., ESQ.

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1 (Case called)

2 THE COURT: I'll take appearances of counsel, starting
3 with the plaintiff.

4 MR. THORSNESS: Good afternoon, your Honor. Bill
5 Thorsness for plaintiff Citizens Finance.

6 THE COURT: Good afternoon, Mr. Thorsness.

7 And for the defendant.

8 MR. DWYER: For the defendant, your Honor, John Dwyer.

9 THE COURT: Good afternoon, Mr. Dwyer.

10 All right. We're here for a scheduling and status
11 conference in this matter following the close of fact
12 discovery.

13 I'm in receipt of the parties' letter, which came in
14 May 18th in advance of this conference. I think we had some
15 adjournments so it's a little bit dated at this point, but you
16 indicated in the order that fact discovery is closed in this
17 matter, is that correct?

18 MR. THORSNESS: Yes, your Honor.

19 MR. DWYER: Yes, your Honor.

20 THE COURT: Okay. And is there expert discovery?

21 MR. THORSNESS: No, your Honor.

22 MR. DWYER: No, your Honor.

23 THE COURT: All right. So discovery is closed.

24 Now I know that I have a pending motion to dismiss on
25 the counterclaim, which I think is basically repeated now in

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1 the pending motion to dismiss the pending summary judgment
2 motion with respect to the counterclaim, is that right?

3 MR. THORSNESS: Your Honor, we did incorporate --
4 there are legal arguments strictly in a motion to dismiss. The
5 summary judgment motion on the counterclaim also raises factual
6 bases to dismiss -- I mean, to grant summary judgment based on
7 the documents that were produced for discovery.

8 THE COURT: Okay. But all of the legal arguments from
9 the motion to dismiss are incorporated in the summary judgment
10 motion.

11 MR. THORSNESS: Absolutely, Judge.

12 THE COURT: So if we're going forward with the summary
13 judgment motion, there's no need to tackle both. You could
14 withdraw or I could dismiss as moot the motion to dismiss and
15 just deal with the issues raised in the summary judgment
16 motion.

17 MR. THORSNESS: Certainly if you grant the summary
18 judgment motion on the counterclaim, your Honor, the motion to
19 dismiss would be moot. We did not articulate, for brevity, all
20 of the additional legal reasons that we set forth in the motion
21 to dismiss.

22 THE COURT: Incorporated in the --

23 MR. THORSNESS: Yes. So for example, waiver
24 arguments, your Honor, no duty exists as a matter of law, those
25 kinds of things are not repeated verbatim in the summary

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1 judgment motion, so we did stick to really factual issues in
2 the summary judgment motion, Judge.

3 THE COURT: And the summary judgment motion, am I
4 right, it's fully briefed now?

5 MR. DWYER: Yes, your Honor. It's submitted.

6 THE COURT: And Mr. Dwyer, from the defense
7 perspective, I mean, I guess there's a couple of things. I
8 gather it came in before close of discovery. It also did come
9 in, and as I think you've noted, I typically try to discourage
10 summary judgment practice in bench trials, unless there are
11 circumstances that make it a good use of resources. And you
12 tell me. I mean, the reason for that is, I think most
13 efficient is a bench trial, which is basically just a big
14 summary judgment motion with the opportunity to cross-examine
15 fact witnesses, because I take direct testimony by declaration
16 for bench trials, rather than sort of coming through the record
17 and determining whether or not there's a material issue in
18 dispute. Why not just get to final resolution as quickly as
19 possible? So that's typically my posture with respect to
20 summary judgment.

21 Now sometimes lawyers say, but here's a good reason to
22 do this, it substantially would narrow the scope of trial, we
23 would need two witnesses rather than eight witnesses to come in
24 for cross-examination, it would substantially impact our
25 settlement discussions going forward, etc. So sometimes there

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1 is good reason. But my general posture is, let's just get it
2 resolved once and for all.

3 Mr. Dwyer, with respect to your opposition to the
4 summary judgment motion -- and it's in the queue but I haven't
5 gotten to it yet -- do you have a position with respect to the
6 filing of that motion prior to the close of fact discovery?

7 MR. DWYER: Not to that, no. I don't think the fact
8 that it was filed before fact discovery has any real impact in
9 it.

10 THE COURT: You had what you needed to file the
11 motion.

12 MR. DWYER: Yes.

13 THE COURT: As the counterclaim plaintiff, do you have
14 a position with respect to resolution of the summary judgment
15 motion pretrial?

16 MR. DWYER: I understand what the Court said,
17 particularly about taking testimony by declaration. I think
18 the factual disputes that we've set up in the summary judgment
19 response relate essentially solely to the counterclaim.
20 There's a dispute about the handling of the collateral and the
21 sale of the collateral, and there's some perception differences
22 in who had the duty to do what and what the consequences were
23 of waiting this period of time, so those are the real factual
24 issues. I think they could probably be fleshed out a little
25 bit in a bench trial better than a summary judgment motion, but

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1 it's not dramatically complex. I think we'd be dealing with
2 the same witnesses, the example you gave, but I don't think
3 it's going to cut the number of witnesses any at all to do a
4 bench trial, or the summary judgment is not going to limit the
5 number of witnesses. It's going to be the same folks, unless
6 it's totally granted.

7 THE COURT: Mr. Thorsness?

8 MR. THORSNESS: Thank you, your Honor.

9 So your Honor, first, we did take substantial caution
10 and we did not file a motion for summary judgment before fact
11 discovery closed. We did ensure that it was done. We
12 certainly understand your standing orders, and we did comply
13 with that, your Honor. I just wanted to clear that up.

14 Number two, Judge, the reason why summary judgment
15 is -- there is good cause, here, there is nothing in dispute.
16 Ignore the counterclaim, for example. There's a \$2.5 million
17 deficiency on an aircraft loan that was not paid. Before the
18 suit was ever filed, there was a forbearance agreement, and I
19 certainly don't need to explain to the Court what that
20 necessarily means in a commercial lending relationship.
21 Everything was admitted to, the defaults were admitted to, the
22 debt was admitted to, waivers, releases, etc. We see it all
23 the time. Before filing suit. Subsequent to filing suit, the
24 aircraft was sold and requests to admit were answered, all in
25 the affirmative, substantively, and then in the summary

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1 judgment opposition, Judge, nothing was disputed, on the
2 affirmative claims. The 2.4 million on the breach of contract
3 under Justice Aviation, which is the borrower, and the
4 2.4 million and change against the guarantor, who, of course,
5 happens to be a currently sitting governor -- and I wanted to
6 make clear for the Court as well that the bank, they did not
7 want to file this suit. Certainly a national bank like
8 Citizens does not take any joy in suing sitting politicians. I
9 mention that, Judge, because this is kind of an aberration. I
10 do a lot of financial institution work, and banks want to get
11 paid, certainly, but they do not want to raise public ire, or
12 suing a sitting governor is not something they take joy in.
13 That should help explain how challenging it has been to get
14 movement in this case; movement in terms of any kind of
15 settlement to address this deficiency, and why summary judgment
16 is compelled, Judge, you can frankly rubber stamp a judgment on
17 the affirmative claims today, but for the counterclaim, and we
18 can talk about that. And I think the same conclusion follows.
19 Because there's nothing that's disputed, on the affirmative
20 claims.

21 THE COURT: But that makes it sound like if we go to
22 trial, it's all about the counterclaims.

23 MR. THORSNESS: And I haven't gotten to that, Judge,
24 and I was getting there.

25 And before I get to the counterclaim, Judge, you had

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1 mentioned substantially advancing settlement opportunities. I
2 believe, personally, having lived with this for about a year
3 and a half now, that in order to get the guarantor's attention,
4 a judgment would certainly advance that, Judge. I don't want
5 to guess or speculate or even, you know, repeat conversations
6 that I've had with counsel, but we have gotten, you know,
7 nowhere on advancing settlement, Judge, and the bank can't do
8 anything. They're out \$2½ million, and they want to move this
9 forward, and so we filed summary judgment. Defendants didn't
10 take any depositions because there's no fact issues, Judge, and
11 there was no discovery disputes, which I appreciated.

12 So on that respect, even setting aside the
13 counterclaim, entering judgment on the affirmative claims today
14 would substantially impact the opportunity for potential
15 settlement in advance of any enforcement actions, Judge, and
16 excluding the counterclaim, you can enter full judgment on the
17 guarantee because the counterclaim does not impact Count Two.
18 It only impacts a \$100,000 offset on Count One. And there are
19 probably 15 different reasons, Judge, why the counterclaim
20 summary judgment, or dismissal on that should be granted. I'm
21 prepared to go through each of those today. I think from a
22 very high-level perspective, what they are saying is that a
23 bank not responding to a purchase offer by a borrower within
24 two hours and losing a sale is, as a matter of law, a violation
25 of the covenant of good faith and fair dealing. Now, I mean,

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1 we don't argue public policy, but at the end of the day, that's
2 a big issue, and I think on a public policy basis, if that were
3 sustainable, as a matter of law, that impacts commercial
4 lending relationship, because any borrower is going to throw up
5 anything up against the wall to suggest that it can be
6 unreasonable for a lender to do this, that, or the other thing
7 when 25 pages of loan documents, the forbearance agreement --
8 and the lender is trying to protect its collateral. We think
9 that the counterclaim can't be sustained, and that's public
10 policy reason, Judge, but I mention that first because it is
11 important.

12 THE COURT: Okay. So at least at the end there, or
13 somewhere in that, you maintain the position I should resolve
14 the summary judgment motion on the counterclaim and then
15 because it's important for settlement purposes. But it also
16 seemed like what you were saying was proceeding with respect to
17 the affirmative claims, the initial claims, in some summary way
18 as well, no?

19 MR. THORSNESS: I'm sorry, Judge. We moved for
20 summary judgment on everything. My first long spiel there was
21 the affirmative claims, breach of contract, breach of
22 guarantee. There's no dispute, there's no factual dispute
23 whatsoever, other than a hundred-thousand-dollar offset, which
24 is this counterclaim on Count One. And --

25 THE COURT: And again, it's in the queue and I haven't

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1 gotten to it yet, so I misunderstood. But you have moved, the
2 plaintiff has moved for summary judgment with respect to the
3 asserted plaintiff's claims.

4 MR. THORSNESS: Oh, yes, Judge.

5 THE COURT: And you moved on behalf of Citizens for
6 summary judgment with respect to the counterclaims.

7 MR. THORSNESS: Correct, your Honor.

8 THE COURT: Okay. Understood.

9 Mr. Dwyer.

10 MR. DWYER: Well, we disagree. I mean, the two-hour
11 comment I think lays out the fact dispute. The bank thinks
12 that it's a two-hour issue, we think it's a six-day issue.
13 There's email back and forth between in-house counsel and, you
14 know, what's sufficient notice to tell them that we need a
15 decision, we've got a seven-day contract, you don't give us
16 authorization till I think over six days, and so we lost the
17 deal.

18 THE COURT: I understand that position with respect to
19 your assertion of disputed facts with respect to the
20 counterclaim. What about with respect to, in your posture as
21 defendant, opposing summary judgment with respect to the
22 affirmative claims asserted by Citizens?

23 MR. DWYER: Based on the statement of material facts
24 and the responses that we made to that, I don't think there are
25 any real disputes over the affirmative claim. The fact dispute

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1 here is going to be on the counterclaim.

2 THE COURT: So, I mean, I suppose in that sense it
3 would substantially alter the course of trial if I were to
4 rule -- I mean, it sounds like almost on consent, but I get
5 that it's not consent. I take it back. I understand. I don't
6 mean on consent. But tell me if this is right. In your
7 opposition to the motion for summary judgment, does the
8 defendant provide argument opposing summary judgment on the
9 plaintiff's affirmative claims?

10 MR. DWYER: No.

11 THE COURT: Okay.

12 MR. DWYER: No. And we've admitted the authenticity
13 of the loan agreement, the security agreements, the forbearance
14 agreement, those documents are --

15 THE COURT: So is there any reason I don't just orally
16 grant today the plaintiff's motion for summary judgment with
17 respect to the affirmative claims?

18 MR. DWYER: On liability. There's obviously a
19 question what the damages are.

20 THE COURT: On liability.

21 MR. DWYER: I don't -- I hate admitting this, but I
22 don't think that we've really put anything in the record that
23 could stop you from doing that.

24 THE COURT: All right. So I think I don't need to
25 waste anybody's resources. I will grant the plaintiff's motion

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1 for summary judgment, with respect to liability. Based on the
2 motion for summary judgment papers, including the 56.1
3 statements and disputed facts, there are no material issues of
4 disputed fact with respect to liability with respect to
5 plaintiff's claims. So summary judgment is granted with
6 respect to the plaintiff, with respect to liability on the
7 plaintiff's affirmative claims.

8 And does the damages question turn on the counterclaim
9 or other facts?

10 MR. DWYER: On the counterclaim, they've put their
11 calculation of the balance in, and I don't believe we've
12 disputed that, so I think that the damages are going to turn on
13 the counterclaim.

14 THE COURT: All right. And if we proceed to trial on
15 that, Mr. Dwyer, what does trial look like from counterclaim
16 plaintiff's perspective?

17 MR. DWYER: It looks like primarily two witnesses.
18 The complicating factor is, one of those witnesses is
19 Mr. Lipke, who is counsel for the plaintiff, who was personally
20 conducting the settlement negotiations and was the point of
21 contact on the negotiation. The other witness would be Dustin
22 Dean, who is in-house counsel at the time for Justice, who was
23 acting in that role for them. So there is a bit of a quirk in
24 terms of proof on that because counsel was involved in
25 negotiating it and counsel was involved in selling the asset.

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1 But those would be the two -- the only two witnesses I think
2 would be absolutely necessary for trial. But --

3 THE COURT: And does your summary judgment opposition
4 include declarations of Lipke and Dean?

5 MR. DWYER: No, it does not include declarations from
6 them. It refers mostly to emails that were included in
7 declarations. They put in everything in their motion so we
8 just referred to their declarations.

9 THE COURT: Okay.

10 MR. DWYER: It's almost entirely email traffic between
11 those two gentlemen.

12 THE COURT: So for your case, if we're proceeding to
13 bench trial, you'd present declarations from them?

14 MR. DWYER: I'm not sure I can get a declaration from
15 Mr. Lipke, since he's opposing counsel. I can certainly get
16 one --

17 THE COURT: So you would call him as an adversarial
18 witness.

19 MR. DWYER: I would have to, yeah.

20 THE COURT: Understood. And then Dean you would put
21 in a declaration?

22 MR. DWYER: I would plan to do that, yes.

23 THE COURT: One live witness for affirmative testimony
24 and then a declaration witness who would be available for
25 cross-examination. Mr. Thorsness, from your perspective, what

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1 would trial look like?

2 MR. THORSNESS: Sure, your Honor. And the damages on
3 the counterclaim is only relevant to Count One. Damages is not
4 relevant at all on Count Two. The defendants did not oppose,
5 did not rebut that argument in our summary judgment motion. A
6 guarantor does not get any defenses of the borrower, especially
7 if it's an absolute unconditional guarantee. We cited Second
8 Circuit law and I believe law of this district as well, Judge.
9 So on the witnesses, and this is a hundred-thousand-dollar
10 issue, Judge.

11 THE COURT: Yes.

12 MR. THORSNESS: Also just for the Court, to the
13 extent -- we likely will collectively burn through a hundred
14 thousand dollars preparing for trial and conducting trial, but
15 be that as it may, Mr. Lipke --

16 THE COURT: And I recognize that and I appreciate it,
17 but that doesn't answer the question of whether there's a
18 disputed issue of fact. What it should do is motivate
19 everybody to settle if there is a disputed issue of fact.

20 MR. THORSNESS: Absolutely understood, your Honor.
21 And I just raise that for the Court and there's probably five
22 documents that we attached to our summary judgment motion that
23 your Honor would -- if you did consider the motion, would need
24 to review to kind of just grant judgment on that as well, but
25 to answer your question -- long way around it -- your Honor,

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1 Mr. Lipke is the head of our reorganization group in Chicago.
2 Of course if subpoenaed to testify, he would testify. We'd
3 have to review that. But in any event, on our side, we would
4 want to call, at a minimum, Mr. Justice's son, who is the
5 principal architect of the negotiations of this helicopter
6 sale, which has been admitted. We may also need to call the
7 governor as well. Number one is absolute, number two is
8 potential. But three and four are also absolute, and the
9 potential buyer who walked, who I'm not sure where he is, but
10 he may be in one of the -- he may be in the Caribbean. The
11 fourth is the broker retained by Justice Aviation to sell the
12 aircraft, and the reasons for why the aircraft were -- the
13 initial sale was lost. And that's all fleshed out in the
14 emails, Judge, but we foresee at least that happening.

15 THE COURT: Okay. And let me just ask briefly, just
16 so I understand. As I said, I haven't gotten through the
17 papers yet, but you say two hours, the other side says six
18 days. Why isn't that a disputed issue of fact?

19 MR. THORSNESS: It turns on when the covenant of good
20 faith and fair dealing triggered. So on July 6, 2017, the
21 borrower got an offer for \$2.2 million to sell the aircraft.
22 They emailed my partner, Mr. Lipke: "We got this offer. Do
23 you want us to accept it?" That's what the email said. And
24 this is all in conjunction with ongoing emails, trying to set
25 up a call to talk about the 2½, \$3 million inevitable

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1 deficiency. So the email was: "We got this offer. Would you
2 like us to accept it?" No comments about, this is a seven-day
3 offer, it's going to expire, this is an urgent sale, we've got
4 to hear back from you immediately. Nothing.

5 Another five days go past, go by, without borrower's
6 counsel following up on that potential sale. In those five
7 days the borrower is negotiating the price with a buyer, trying
8 to get a higher amount, with the broker telling the borrower
9 that you could lose this if you keep pushing that kind of
10 thing.

11 July 11th comes around. They email Mr. Lipke again,
12 saying the offer might -- may be able to be up \$50,000 and it
13 may be for another week or so. Do you want us to accept? Will
14 Citizens release its lien? No comments on the urgency, no
15 comments on the buyer could walk at any moment. Then Mr. Lipke
16 responds, and I don't know, as I sit here today, this moment,
17 what exactly he responded, but the next morning, at 8 a.m. on
18 July 12th, there was an email from Mr. Dean, the borrower's
19 lawyer, stressing the urgency for the first time of getting
20 back to us on whether we can accept the deal. Within two hours
21 Mr. Lipke confirmed with Citizens, based on some conditions
22 that they had to meet, including that it was an arm's length
23 deal and the purchase price was fair market value, that yes,
24 Citizens will release its lien if you get this price and it's
25 an arm's length deal. So within being notified, within two

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1 hours of being notified of the urgency of the sale, we
2 consented to it. And now this is a default scenario, your
3 Honor, where the bank knows it's going to be out a couple of
4 million dollars. It wants to ensure that the collateral, its
5 only piece of recovery, you know, but for the governor, who we
6 believe is a billionaire, is worth -- it's maximizing the value
7 of that collateral when it sells it. And so its concern was
8 being out \$2½ million and not walking away from its collateral
9 without asking a couple of additional questions. So two hours
10 is the day of July 12th between the first notice of urgency and
11 our response. The six days is when the offer was initially
12 emailed to Mr. Lipke.

13 THE COURT: All right. Well, I think given that it's
14 fully briefed, and we've limited what remains of the summary
15 judgment motion pending before me to the counterclaim
16 arguments, right, at this point, I'll resolve that, and I think
17 if I conclude that there's a genuine issue of material fact,
18 I'm not going to spend a lot of time with an extensive opinion.
19 I'll just let you know that and we'll come in and we'll
20 schedule trial, and hopefully at that point you'll reach
21 settlement. But I think since it's fully briefed, in light of
22 what's represented, I should tackle that issue and then bring
23 you back in.

24 MR. THORSNESS: Thank you, your Honor.

25 MR. DWYER: Thank you, your Honor.

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1 THE COURT: All right. And I think in your papers
2 you'd said there was some interest in referral to the
3 magistrate judge for mediation, for a settlement conference.
4 Is that still of interest? Probably do that now that I just
5 said I'm going to rule on the summary judgment motion.

6 MR. DWYER: I believe there's interest in trying to
7 mediate. Bill and I have been talking about this. We've been
8 talking with the clients. Mr. Dean and Mr. Lipke, the reason
9 they were in communications, they were trying to resolve this.
10 I don't know how much help a mediator is going to provide these
11 type of parties. I will agree with Bill to this extent, that
12 writing in and saying that the Court entered judgment on
13 liability will get their attention, possibly more than a
14 magistrate. And Citizen has been insistent on having the
15 governor attend personally. We tried to get them to agree to
16 come to West Virginia, to Greenbrier, which the governor
17 happens to own, for mediation. They don't want to do that.
18 They want to come here. And I have some concerns about getting
19 the governor to commit to come here for purposes of mediation.
20 Jay, his son, would be another story, I think, if we could come
21 on behalf of Justice Aviation. I'm not a hundred percent sure
22 how helpful that would be, honestly.

23 THE COURT: Well, so it sounds like no request at this
24 point --

25 MR. DWYER: Not from the defendants, no.

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1 THE COURT: All right. Well, I ruled on the
2 plaintiff's affirmative claims with respect to liability. Take
3 that to your clients and see if that moves things along. Why
4 don't you let me know. You can tell them that the judge wants
5 to know within two weeks' time whether you'd like the referral
6 to the magistrate judge for a settlement conference at this
7 point. If the answer is no, the answer is no. I'll resolve
8 what remains of the summary judgment motion. And, look, I'd be
9 happy to take one motion off my queue, so if all we're talking
10 about is a hundred thousand dollars, try to get to settlement
11 before I rule, and just let me know.

12 MR. DWYER: We'll let you know immediately if we can
13 do that, your Honor.

14 THE COURT: And otherwise, I'll give you resolution to
15 the summary judgment on the counterclaim, and then if it
16 proceeds, I'll bring you back in.

17 MR. DWYER: Thank you, your Honor.

18 THE COURT: What else can I address?

19 MR. THORSNESS: Thank you, your Honor. On the
20 two-week letter, would you like us to submit a joint letter on
21 that?

22 THE COURT: Yes, just a joint letter, either telling
23 me that you've settled or telling me that you haven't settled
24 but you would like the referral to the magistrate judge or
25 telling me that you're not seeking any settlement assistance at

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1 this time.

2 MR. THORSNESS: Okay.

3 THE COURT: Okay.

4 MR. THORSNESS: Thank you, your Honor. Thank you for
5 accommodating our schedule as well.

6 THE COURT: Okay. Anything else?

7 MR. DWYER: That's it. Thank you.

8 THE COURT: Thank you. We're adjourned.

9 THE DEPUTY CLERK: All rise.

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